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No. 82-767

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DR. NATHANIAL F. WILLIAMS,
Petitioner,

v.

VISION CARE SERVICES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF DR. NATHANIEL L. WILLIAMS

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I. VISION OF CARE SERVICES, INC. CHARACTERIZES ITSELF AS "AN INSURER."

In reading its arguments in its brief in opposition to the petition for a writ of certiorari, Vision Care Services, Inc. has characterized itself as an insurer. Such a characterization of itself by Vision Care Services, Inc. is irrelevant to this case. The restraints involved in this case are not restraints between Vision Care Services, Inc. and persons who are insured by Vision Care

Services, Inc. These are separate contractual agreements between Vision Care Services, Inc. and panel doctors engaged in the sale and distribution of goods and services other other than insurance. Thus, the arrangement in this case is virtually identical to that which existed in Group Life and Health Insurance Company v. Royal Drug Company, 440 U.S. 205 (1979). In the Group Life case, Blue Shield, a recognized insurance company, "offered "offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at $2.00 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed." The Group Life case presented this court with the question of whether the contracts between Blue Shield and the pharmacies constituted the "business of insurance." Group Life at

209. And thereby excepted Blue Shield from the Antitrust Laws under section 2(b) of the McCarran-Ferguson Act. Group Life at 210. This court held that the activities involved were not insurance activities and therefore not exempt. This court pointed out that "[i]nstead of a total exemption, Congress provided in section 2(b) that the antitrust laws 'shall be applicable' unless the activities of insurance companies are the business business of insurance and regulated by state law." Group Life at 219. In Group Life case the District had granted summary judgment to the defendant and the court of appeals reversed. This court sustained the decision of the court of appeals. Therefore, the case was remanded to the trial court for a determination on the antitrust issues.

In the case presently before this court, the activities between Vision Care Services, Inc. and the doctors are not "the business of insurance." Thus, this case, like the Group

Life case, should not have been dismissed on summary judgment, but there should be a trial on the antitrust issues.

II. VISION CARE SERVICES, INC. DISAGREES WITH THE PETITIONERS DESCRIPTION OF THE VISION CARE PLAN.

While Vision Care Services asserts in its brief that the petitioner "does not accurately set forth the Vision Care Plan at issue. It in no manner anywhere in its brief states in any portions of the petitioner's description that Vision Care Services regards as inaccurate. Vision Care Services merely tries to divert attention to some of the less controversal aspects of its plan. The arrangements in question in this case clearly involve more than an "insurer" providing goods and services to its "insureds" or a quality on sources of supply.

On page seven of its brief Vision Care Services attempts to give the impression that its contracts merely set the amount that Vision

Care Services is willing to pay the panel doctors. This is cearly not the situation. The Vision Care Service contract restricts the participating panal doctors from charging more than the amount established by Vision Care Services without regard to who is to pay the amount. This fact is clearly set forth in Paragraph VI of the Vision Care Services contract. In that paragraph which is entitled "Supplemental Services" the contract provides, "The Doctor will consider the payment by Vision Care Services as payment in full for all authorized services and will not bill the patient for any part thereof." Thus, the price fixing extends beyond the point to which Vision Care Services would have to pay.

In the same paragraph Vision Care Services has another price restraint. It restricts the amount that may be charged for services and materials which are not authorized by the Vision Care Services plan. In other words, Vision Care sets a price ceiling

patient himself is responsible for paying the entire amount. The contract provides that the amount that the doctor may charge in these instances "must not exceed the actual laboratory cost of materials used plus the following fee schedule for services performed." The Vision Care Services contract then sets forth the fixed fee schedule.

III. VISION CARE SERVICES, INC. AGRUES THAT ITS RESTRICTIONS ON THE DOCTORS' SOURCES OF SUPPLIES WERE "TO MAINTAIN CERTAIN QUALITY STANDARDS."

The quality control contention is not supportable by anything in the pleadings or in the record. Since the inquiry letter which Vision Care Services sends out ask only about the prices charged, it appears that the price that the supplier will charge the doctor for the laboratory materials is the prime, if not the sole selective factor. However, if Vision Care Services, Inc. has "certain quality standards" it should be required to show that at trial. Other factors indicating that quality

standards is the basis for the source restriction are Paragraph IV of the Vision Care Services contract which requires that "all materials must be American made and supplied," and Paragraph IV A. 1 which states that "only American made frames may be used." There is no rational relationship between the geographical place of manaufacture and the quality of the product.

IV. VISION CARE SERVICE, INC.'S ATTACK ON DR. WILLIAMS' CHARACTER IS UNWARRANTED, MISLEADING AND IRRELEVANT TO THE ISSUES BEFORE THE COURT IN THIS CASE.

On page three of its brief, Vision Care Services, Inc. attempts to give the impression that Dr. Williams attempted to perpetrate a fraud. Such is not the case. Dr. Williams did not state that an examination had taken place after Mr. Rich had died. It is beyond question that Dr. Williams examined Mr. Rich while Mr. Rich was alive. However, Dr. Williams did not send in a request for payment for some time after the examination. Mr. Rich

died after the examination but before Dr. Williams sent in the request for payment for his services. Dr. Williams did not know Mr. Rich had died when he sent in the request for payment. When Dr. Williams sent in the request request for payment he indicated a date close to the time when the payment was requested rather than the actual date on which Mr. Rich had been examined. In short, Dr. Williams did not claim payment for examination of a person who was already dead. He simply gave a wrong date for an examination that had actually occurred.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari in this case should be granted.

Respectfully submitted

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